No. 87-519

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

GARY D. MAYNARD and the
ATTORNEY GENERAL OF THE
STATE OF OKLAHOMA,
Petitioners,

v.

WILLIAM THOMAS CARTWRIGHT,
Respondent.

BRIEF OF AMICUS CURIAE CALIFORNIA APPELLATE PROJECT

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TABLE OF AUTHORITIES

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The California Appellate Project submits the attached brief *amicus curiae* in the above-entitled case. The consent to file the brief has been obtained from the attorneys for the parties.

STATEMENT OF INTEREST OF AMICUS CURIAE

The California Appellate Project ("CAP") is a nonprofit corporation established by the State Bar of California to assist the California Supreme Court in recruiting competent appointed counsel for automatic appeals and in insuring that they are providing the quality of representation demanded by those cases. Pursuant to this mandate, CAP provides direct representation to seven capitally sentenced defendants and assists appointed counsel in more than 140 other capital appeals. Because of its extensive involvement in capital cases, CAP is familiar with the issues concerning the "especially heinous, atrocious, or cruel" language as it has appeared in California's death penalty statute.

CAP has recently become aware of statements made in the briefs of Petitioner and of Amici Alabama, et al., characterizing California as a state with a provision in its death penalty law similar to that which is at issue in the present case. CAP believes that this characterization of California law is inaccurate and should be clarified so that the Court's decision in this case will be based on accurate information.

To the best of CAP's knowledge, the Court has not had and will not otherwise receive the benefit of briefing from a litigant directly familiar with California's death penalty statutes. We are therefore asking leave to file the within brief, to ensure that the Court is presented with an accurate characterization of California law.

THE QUESTION OF LAW PRESENTED

Both Petitioner and Amici Alabama, et al. classify California as a state whose capital punishment scheme has a provision "equivalent to," or of the same "import" as, Oklahoma's "especially heinous, atrocious, or cruel" aggravating circumstance. Brief of Petitioner, 34, n. 4, and accompanying text, & Appendix A; Brief of Amici, 2, n. 1. Actually, however, California cannot be grouped with these other states, for at least two reasons.

First, California has not had such a provision in effect since 1982, when the state's supreme court found it unconstitutionally vague under both the state and federal constitutions. *People v. Superior Court (Engert)*, 31 Cal.3d 797 (1982).

Second, the overall context in which California's death penalty law employed the "heinous, atrocious, or cruel" language was significantly different from that found in most, if not all, of the other states listed. The California provision authorized the jury at the guilt-phase of a capital trial to find, as a "special circumstance," that "the murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity;" the statute specifically defined this latter phrase as "mean[ing] a conscienceless, or pitiless crime which is *unnecessarily torturous to the victim.*" Cal. Pen. Code, § 190.2(a)(14) (emphasis added). But the California law also contains a separate "special circumstance" provision that covers the intentional "infliction of torture." Cal. Pen. Code, § 190.2(a)(18). The question then naturally arose: What was the "heinous, atrocious, or cruel" special circumstance intended to cover that the "torture" special circumstance does not also cover? In light of the initiative statute's specific definition of "heinous, atrocious, or cruel," it was impossible to tell. See *Engert*, 31 Cal.3d at 802, n. 2[1]. Thus, the overall context made the problem of affixing a plausible meaning to California's "heinous, atrocious, or cruel" provision insurmountably problematic.

Indeed, the most plausible purpose of the "heinous, atrocious, or cruel" special circumstance was the patently unconstitutional one of serving as a "catchall" to make every murderer eligible for the death penalty. At the time California's death penalty initiative was submitted to the state's electorate for adoption, the initiative's drafters told the voters that the proposed law would make the death penalty "apply to every murderer." See Official Cal. Voters Pamp., Gen. Election (Nov. 7, 1978) at 34.[2] The only special circumstance that might have qualified to serve as the catchall needed to satisfy this promise was the "heinous, atrocious, or cruel" special circumstance.

The constitutional problem with the drafters' intentions is obvious. The Constitution requires a death penalty statute to "genuinely narrow the class of persons eligible for the death penalty," *Lowenfield* v. *Phelps*, ___ U.S. ___, ___, 98 L.Ed.2d 568, 581 (1988); the "special circumstance" provisions were designed to fulfill this requirement in California. See *California* v. *Ramos*, 463 U.S. 992, 1008 (1983); *Pulley* v. *Harris*, 465 U.S. 37, 53 (1984). Thus, had California's

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[1] The problem of trying to define "heinous, atrocious, or cruel" in California was exacerbated because the statutory definition of this special circumstance was phrased in terms of "unnecessary" torture. As the state supreme court noted, "any attempt to determine what constitutes 'necessary' torture — to clarify the meaning of 'unnecessary' — appears to be futile. [The language about] 'unnecessarily' torturous assumes the existence of conduct that is necessarily torturous. . . . We cannot fathom what it could be." *Id.* at 802-03.

[2] In determining the meaning or purpose of an initiative measure, California courts have long relied on arguments made by the proponents of the measure in the official voter pamphlets. See, e.g., *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 22 Cal.3d 208, 245-46 (1978); *Carter v. Seaboard Finance Co.*, 33 Cal.2d 564, 580-81 (1949); *Carter v. Com. on Qualifications, etc.*, 14 Cal.2d 179, 185 (1939).

"heinous, atrocious, or cruel" special circumstance been interpreted so as to make "every murderer" death-eligible, state's entire death penalty scheme would likely have been invalid.

CONCLUSION

In sum, contrary to the allegations of petitioner and Amici Alabama, et al., the "heinous, atrocious, or cruel" language of California's death penalty law is not an operative feature of that law nor, viewed in context, can it be deemed "equivalent to" or "to the same effect as" such language in other states' death penalty laws.

Dated: March , 1988

Respectfully submitted,

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